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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85365295
Applicant	E. Mishan & Sons, Inc.
Applied for Mark	ROCKET FITNESS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APPLICANT : E. Mishan & Sons, Inc.
SERIAL NO. : 85/365,295
FILING DATE : July 7, 2011
FOR : ROCKET FITNESS
EXAMINING ATTORNEY : Nicholas A. Coleman, Esq.
LAW OFFICE : 115


APPLICANT'S APPEAL BRIEF

Applicant, E. Mishan & Sons, Inc. ("Applicant"), pursuant to 37 C.F.R. § 2.141, appeals the final refusal, dated April 9, 2012, refusing registration of the trademark **ROCKET FITNESS** for the following goods:

"Manually operated exercise equipment, namely, push-up assistance devices, thigh muscle toning devices, and wheels for floor abdominal exercises; exercise bands; straps for fitness training, namely, stretch-out straps; personal exercise mats; exercise balls; medicine balls; all for home use."

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of Registration Nos. 2,949,557 and 2,994,711 for the marks shown below.

Registration No.	Trademark
2,949,557 ("557 Registration")	ROCKETLOK

<p>2,994,711 ("711 Registration")</p>	
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Both of the cited marks are registered for:

"Manually operated exercise equipment, namely a weight exercise apparatus having an interlocking grip bar and rotationally removable weight plates, featuring a weight plate attached to a socket on the grip bar which can be interlocked with additional weight plates using a simple inset and twist motion and designed to limit rattle-type noise typical of loose weights on a barbell and featuring a latching mechanism to prevent a weight plate from being accidentally disconnected."

The Trademark Status and Document Retrieval (TSDR) system indicates that the '711 Registration was cancelled on October 12, 2012 for failure to file an acceptable Section 8 declaration. A copy of the TSDR status sheet for the '711 Registration is attached.

Thus, the refusal based on the '711 Registration is moot and Applicant's appeal brief addresses only the refusal based on the mark of the '557 Registration.

I. PROCEDURAL HISTORY

On July 7, 2011, Applicant filed an application to register ROCKET FITNESS as a trademark for "manually operated exercise equipment, exercise bands, straps for fitness training, personal exercise mats, exercise balls, medicine balls".

On October 28, 2011, the Office issued a first office action refusing registration of the ROCKET FITNESS mark based on the cited registrations.

The Office also found the identification “straps for fitness training” to be indefinite.

On March 8, 2012, Applicant filed a response to the first office action, with arguments against the Section 2(d) refusal. Applicant also amended the identification of goods to its current form, namely:

“Manually operated exercise equipment, namely, push-up assistance devices, thigh muscle toning devices, and wheels for floor abdominal exercises; exercise bands; straps for fitness training, namely, stretch-out straps; personal exercise mats; exercise balls; medicine balls; all for home use”.

On April 9, 2012, the Office issued a final office action which made “final” the Section 2(d) refusal.

On October 9, 2012, Applicant filed a notice of appeal and a request for reconsideration (“RFR”).

The Trademark Trial and Appeal Board suspended the appeal pending consideration of the request for reconsideration by the Examining Attorney.

The request for reconsideration was denied on December 11, 2012.

The Board resumed the appeal on December 12, 2012.

II. ARGUMENT

Likelihood of confusion has been said to be synonymous with “probable” confusion - it is not sufficient that confusion is merely “possible.” See, *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 164 U.S.P.Q. 43, 44 (C.C.P.A. 1969) (“We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimus situations but with the practicalities of the commercial world, with which the trademark laws deal.”); see also, *Triumph Machinery Co. v. Kentmaster Mfg. Co., Inc.*, 1 U.S.P.Q.2d 1826,

1829 (T.T.A.B. 1987)("The Trademark Act, however, does not talk in terms of remote possibilities of confusion but, rather, the likelihood of such confusion occurring in the marketplace.")

Determinations under Section 2(d) of the Trademark Act are to be based on an analysis of all of the probative evidence relevant to factors bearing on the likelihood of confusion issue. Thirteen factors for evaluating the question of likelihood of confusion are set forth in the seminal case of *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 U.S.P.Q. 663 (CCPA 1973). However, the *du Pont* case recognizes that there is no warrant, in the statute or elsewhere, for discarding any evidence bearing on the question of likelihood of confusion and, in fact, the thirteenth factor is: "Any other established fact probative of the effect of use." 177 U.S.P.Q. at 567.

In every case turning on the likelihood of confusion, it is the duty of the examiner, the board and this court to find, upon consideration of *all* of the evidence, whether or not confusion appears likely.

177 U.S.P.Q. at 568.

A. Marks Must Be Compared In Their Entireties

It has been long-settled that marks must be compared in their entireties when evaluating the issue of likelihood of confusion. *Colgate-Palmolive Co. v. Carter Wallace, Inc.*, 432 F.2d 1400, 167 U.S.P.Q. 529 (CCPA 1970); *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 U.S.P.Q. 272, 273 (CCPA 1974); see also, *In re Electrolyte Labs., Inc.*, 16 U.S.P.Q.2d 1239, 1240 (Fed. Cir. 1990) ("No element of a mark is ignored simply because it is less dominant, or would not have trademark

significance if used alone.")

The Office contends that "ROCKET" is the dominant part of the Applicant's Mark and the cited mark. Final office action, p. 3.

Even if ROCKET is indeed dominant, which Applicant does not concede, the other elements of the respective marks and, as well, the marks in their entireties, cannot simply be disregarded. See *In re National Data Corp.*, 753 F.2d 1056, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985); see, also *In re Crosstex International, Inc.*, 2011 TTAB LEXIS 183 *14, 15 (TTAB June 1, 2011)(reversing refusal to register ULTRA in standard character form for "surgical face masks" based on registered ULTRA SOFT and design for "face masks for medical, dental and veterinary use")("We disagree with the premise that the word 'Ultra' is the dominant element of the registered mark. Registrant's mark is a unitary term. The word 'Ultra' modifies the word 'Soft' to convey the meaning that registrant's face masks are very gentle or comfortable.")¹

"ROCKET" and "LOK" are the parts of the unitary mark "ROCKETLOK." The part ROCKET modifies and emphasizes the part LOK.

"ROCKET" and "LOK" must be considered in combination to determine the meanings and commercial impression engendered by the cited mark.

The record does not indicate that purchasers are likely to rely upon the word ROCKET, in disregard of the LOK portion of the cited mark or the mark in its entirety, to identify and recall the Registrant's goods, or that purchasers are likely to recall and use "ROCKET" alone or as the most significant part of the registered mark.

¹ Copies of non-precedential decisions are attached hereto.

Further, although FITNESS is disclaimed in Applicant's Mark, it is well settled that the disclaimed material still forms a part of the mark and cannot be ignored in determining likelihood of confusion. *Industria Espanola de Perlas Imitacion, S.A. v. National Silver Co.*, 459 F.2d 1049, 59 C.C.P.A. 1058 (CCPA 1972); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 U.S.P.Q. 390 (Fed. Cir. 1983).

B. ROCKET FITNESS Differs in Appearance From ROCKETLOK

The appearances of the marks, viewed in their entireties, differ significantly.

Applicant's Mark comprises two separate words: "ROCKET" and "FITNESS".

In contrast, the cited mark comprises one invented word -- ROCKETLOK. "ROCKET" is one part of a unitary coined term.

The word FITNESS of Applicant's Mark and the element LOK of the cited mark do not have any visual similarity.

FITNESS is longer and shares no similar letters or letter sequences that are in the element LOK.

There is no *per se* rule that confusion automatically exists between marks containing an identical word. See e.g., *Food Specialty Co., Inc. v. Kal Kan Foods, Inc.*, 487 F.2d 1389, 1391, 180 U.S.P.Q. 136, 138 (C.C.P.A. 1973) (KAL KITTY STEW and Design for cat food not likely to be confused with KITTY for cat food); *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 167 U.S.P.Q. 529 (C.C.P.A. 1970) (PEAK PERIOD not confusingly similar to PEAK); *In re Ferrero*, 178 U.S.P.Q. 167 (C.C.P.A. 1973) (TIC TAC not confusingly similar to TIC TAC TOE); *Conde Nast Publ 'ns, Inc. v. Miss Quality, Inc.*, 184 U.S.P.Q. 422 (C.C.P.A.

1975) (COUNTRY VOGUES not confusingly similar to VOGUE).²

There is nothing contained in the record that suggests that viewers of the respective marks would not notice or distinguish the marks in view of the several differences in appearances of the respective marks.

In sum, Applicant's mark and the cited mark must be compared in their entireties. A likelihood of confusion analysis cannot disregard the LOK part of the cited mark, and as well, the overall appearance of the respective marks. The respective marks do not look alike. The differences in the overall appearances of ROCKETLOK and ROCKET FITNESS are immediately apparent and the different appearances are easily remembered.

C. ROCKET FITNESS and ROCKETLOK Do Not Sound Alike

The Applicant's mark and the cited mark also differ phonetically.

Applicant's mark is comprised of two words with a total of four syllables -- ROC•KET•FIT•NESS. There is a pause within and between the words ROCKET and

² See also, *In Re Donnay International, Societe Anonyme*, 31 U.S.P.Q.2d 1953 (T.T.A.B. 1994) (no likelihood of confusion between THE GHOST for soccer balls and GHOST for tennis, squash and badminton rackets and bags); *Sears Mortgage Corp. v. Northeast Savings, F.A.*, 24 U.S.P.Q.2d 1227 (T.T.A.B. 1992) (APPROVAL PLUS and APPROVAL FIRST not likely to be confused for mortgage banking and brokerage services since the marks do not closely resemble each other in appearance or pronunciation and since the meaning of each is different); *In re Hair Masters Services, Inc.*, 17 U.S.P.Q.2d 1335, 1336 (Fed. Cir. 1990) (the difference between the mark HAIR MASTERS for styling services and HAIR MASTER for hair tonic was sufficient to permit registration of the mark); *In re Merchandising Motivation, Inc.*, 1984 U.S.P.Q. 364 (T.T.A.B. 1974) (MMI MENSWEAR was found not to be confusingly similar to MEN'S WEAR); and *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373 (Fed. Cir. 1998) (finding no likelihood of confusion between CRYSTAL CREEK for wine and CRISTAL or CRISTAL CHAMPAGNE for wine because "similarities between words in their respective marks is only part of the inquiry into likelihood of confusion.")

FITNESS when spoken.

On the other hand, the cited mark has three syllables: ROC• KET• LOK.

Since ROCKETLOK is a unitary word with fewer syllables than ROCKET FITNESS, ROCKETLOK is pronounced more quickly, without any pause in the middle.

The Applicant's Mark and the cited mark are pronounced with a different cadence due to the different number of syllables.

"ROC" and "LOK" also produce a similar "ock" sound. The first and last syllables of ROCKETLOK have an audible symmetry not audible in the Applicant's Mark.

Moreover, no element in the Applicant's Mark sounds like "lok." "Lok" produces a longer, drawn out ending sound, which is dissimilar from the shorter audible impact of "ness" (in "Fitness"). Conversely, there is nothing in ROCKETLOK that sounds like "Fitness."

Considered in their entirety, ROCKET FITNESS and ROCKETLOK do not sound alike.

D. The ROCKET FITNESS Mark Has A Different Meaning and Conveys A Different Commercial Impression

The meanings of the marks and the commercial impressions engendered by ROCKET FITNESS and ROCKETLOK are also not the same or similar.

Applicant's Mark contains two ordinary words – "ROCKET" and "FITNESS".

"Rocket" means "to move swiftly and powerfully, as a rocket". See Exhibit E, RFR.

"Fitness" means "good health or physical condition, especially as the result of exercise and proper nutrition." See Exhibit F, RFR.

ROCKET FITNESS, when considered in its entirety and in view of applicant's goods, provides a connotation that use of applicant's manually-operated exercise equipment will lead to a quick or powerful path to fitness, that is, that a user's fitness will "rocket," i.e., improve exponentially.

Neither ROCKETLOK nor LOK, per se, has any literal meaning. However, "lok" is phonectically equivalent to the word "lock" which means fasten or secure.

The final Office Action indeed states:

“Similarly, the additional term in the cited marks, LOK, merely identifies a feature of the registrant’s manually operated fitness equipment.”

In fact, “LOK” describes a most significant, patented feature of the Registrant’s goods.

The feature is so significant that the Registrant specifies the locking feature in the identification of goods, by identifying the goods as a type of weight exercise apparatus having a specific locking feature, namely, that "weight plate attached to a socket on the grip bar . . . can be **interlocked** with additional weight plates **using a simple inset and twist motion** and designed to limit rattle-type noise typical of loose weights on a barbell and **featuring a latching mechanism** to prevent a weight plate from being accidentally disconnected." (Emphasis added).

The ROCKETLOK conveys the impression that the Registrant’s exercise equipment locks and unlocks quickly and secures or fastens the weight plates swiftly or in a powerful manner.

The ROCKETLOK mark, considered in its entirety, and in view of the very specific and unique goods described in its registration, conveys the commercial impression that the

registrant's weight apparatus can be quickly locked for adding or removing weight plates from a grip bar.

The registrant's website at the URL www.rocketlok.com ("the Rocketlok Website") emphasize this commercial impression. Copies of Rocketlok webpages are of record (Exhibit G, RFR.) The Rocketlok Website refers to registrant's goods as "quick-change weight systems" and states "Now you can have access to a whole rack of dumbbells at home in the space of just one pair." A portion of the Rocketlok website with the aforementioned text highlighted is shown below.

rocketlok.com

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www.rocketlok.com Website

Third-party websites that sell the ROCKETLOK weight exercise apparatus also refer to the quick weight connect/disconnect feature. See Exhibit H, RFR.

The amazon.com listing for “Rocketlok 5-Pound Handle Set (Pack of 2)” states “Lets you rapidly adjust weights in seconds.”

The amazon.com listing for “Rocketlok 100-Pound Adjustable Dumbbells (Pack of 2)” states “Each dumbbell adjusts from 15 to 50 pounds in 2.5 pound increments in just seconds allowing rapid transition from one exercise to the next”.

The www.fitnessblowout.com website states “Now you can have rapid access to a whole rack of dumbbells at home in the space of just 1 pair.”

The www.gofastfitness.com website states “The Rocketlok (20) pound kettlebell combines 3 kettlebells in one convenient set. The weights quickly adjust from 14lbs. up to 20lbs. to personalize your workout.”

The www.fitnessfactoryoutlet.com“ website refers to “Rocketlok Quick-Change Adjustable Dumbell”.

In addition, a United States patent for the weight exercise apparatus of the cited mark discusses the quick connect and disconnect feature of the registered goods. The specimen of use filed with a Section 8 & 15 declaration (on May 2, 2011) in connection with the ‘557 Registration includes a picture of the weight exercise apparatus, shown below, bearing the ROCKETLOK mark and a patent marking of U.S. Patent No. 7,037,245 (“the ‘245 patent”).



May 2, 2011 Specimen - '557 Registration

The '245 patent entitled "Weight Exercise Apparatus", in part, states: "The receiving receptacle and the mating connector of the insert hub are designed so that **a user may connect two weight plates or a grip bar and a weight plate quickly and easily.**" Col. 3, Ins. 28-31. (Emphasis added)

The final Official Action, in part, states:

When viewed in their entirety, the marks convey highly similar commercial impressions of being quick and speedy exercise equipment providing fast results."

It is respectfully submitted that record is devoid of any evidence that the cited mark conveys any commercial impression whatsoever relating to quick fitness or exercise equipment which achieve fast results.

"It is the impression that the mark as a whole creates on the average reasonably

prudent buyer and not the parts thereof, that is important." J. Thomas McCarthy, 4 McCarthy on Trademarks and Unfair Competition, §23.41, p.23-212 (4th ed. 2012). And, further, the commercial impression of a mark must be evaluated in relation to the applicable goods and services. See, *In re Sears, Roebuck and Co.*, 2 U.S.P.Q.2d 1312 (T.T.A.B. 1987); *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (T.T.A.B. 1984).

The registered mark ROCKETLOK per se, the meanings of the component parts of the mark, the identification of the registered goods and relevant marketplace conditions demonstrate a strong and significant association with a quick-locking exercise mechanism.

In contrast, ROCKET FITNESS has absolutely no association with locks or to a quick connect-disconnect locking mechanism. The term "FITNESS" does not engender any impression pertaining to a locking system whatsoever. The term "ROCKET", as used by Applicant, also has no relation to any locking mechanism. Conversely, ROCKETLOK as a whole and "lok" per se does not suggest anything to do with quickly achieving fitness. The marks convey very different commercial impressions.

The Office has taken the position that potential purchasers may believe that Applicant's goods sold under the ROCKET FITNESS mark constitute a new or additional product line from the same source as the ROCKETLOK weight system. The first office action, in part, states:

"Even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to the overall similarities in sound, appearance, connotation, and commercial impression in the respective marks, that applicant's goods sold under the 'ROCKET FITNESS' mark constitute a new or additional product line from the same source as the goods sold under the 'ROCKETLOK' mark with which they are acquainted or familiar, and that "ROCKET FITNESS" is merely a variation of the registrant's 'ROCKETLOK' mark.

Applicant respectfully disagrees. There is nothing in the record to support such conjecture.

First, as noted above, the term "ROCKET" as used in the registered mark specifically refers to the registrant's quick change weight locking system. The commercial impression of ROCKETLOK is directly tied to that system. Without "LOK", ROCKET has a very different connotation. As a result, consumers would not expect that exercise equipment lacking a locking system to emanate from the registrant. *Cf., In re MTTM Worldwide, LLC*, 2010 TTAB LEXIS 123 *14-15 (TTAB April 26, 2010)(affirming refusal to register MOB NYC based on registered MOB INC. mark)("Consumers would be likely to perceive applicant's mark MOB NYC as identifying a brand extension of registrant's MOB INC. product line originating in New York City, or with a New York City style or look.")

Second, the Applicant uses the ROCKET part of the mark differently. The registered mark combines ROCKET with a misspelling of the word it modifies - lock - to form a single invented compound word: ROCKETLOK. Applicant instead uses ROCKET along with a second stand-alone word: FITNESS.

There may be no likelihood of confusion even when marks are verbally identical marks. In the case of *In re Sears, Roebuck and Company*, for example, the Board reversed the refusal to register the mark "CROSS-OVER" for "brassieres" on the grounds that it was confusingly similar for to the audibly identical mark for "ladies sportswear, namely, tops, shorts and pants." 2 U.S.P.Q.2d 1312 (TTAB 1987). The Board held:

"We agree with applicant that its mark "CROSS-OVER," when applied to brassieres, is suggestive of the construction of the brassieres. Registrant's mark "CROSSOVER," on the other hand, conveys no such meaning when applied to ladies'

sportswear, namely, tops, shorts, and pants. Rather, it appears to us that registrant's mark is likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which "crosses over" the line between informal and more formal wear (i.e., is appropriate for either use), or the line between two seasons. As a result of their different meanings when applied to the goods of applicant and registrant, the two marks create different commercial impressions, notwithstanding the fact that they are legally identical in sound and appearance.

Id. (citations omitted); *see also, In Re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (T.T.A.B. 1984) (no likelihood of confusion between the mark "PLAYERS" for men's underwear and the same mark for shoes); *In Re Sydel Lingerie Co., Inc.*, 197 U.S.P.Q.629, 630 (T.T.A.B. 1977)(no likelihood of confusion between "BOTTOMS UP" for "ladies' and children's underwear" and identical mark for "men's suits, coats, and trousers").

Here, the respective marks are designed to engender specific impressions suggestive of different and unrelated results and, unlike the marks in the *Sears* case, the marks are not legally identical in sound or appearance.

E. Co-Existence of Similar Marks

Applicant owns U.S. Registration Nos. 3,395,378 and 3,979,531 for AB ROCKET and AB ROCKET TWISTER (collectively "the AB ROCKET Marks"), both for "manually-operated exercise equipment." See certificates of registration and the TSDR pages for AB ROCKET and AB ROCKET TWISTER (Exhibits A and B, respectively, RFR.)

The AB ROCKET mark was registered on March 11, 2008

The AB ROCKET TWISTER mark was registered on June 14, 2011.

The Office allowed the Applicant's AB ROCKET Marks to register over the cited

marks. The Office did not cite either of the cited marks of the '557 Registration and '711 Registration during the prosecution of the AB ROCKET trademark applications.

Further, the Office allowed the ROCKETLOK and ROCKETLOK and Design marks to register over a previously registered mark "ROCKIT" (pronounced as "ROCKET"), registered in U.S. Registration No. 1,929,244 for "exercise machines" on October 24, 1995. See certificate of registration for ROCKIT (Exhibit C, RFR.)

Thus, the Principal Register includes at least four (4) active registrations for trademarks that include "ROCKET" [or its phonetic equivalent "ROCKIT"] for types of exercise equipment.

The existence of these registrations show that these marks can and do co-exist without any risk of likelihood of confusion.

Further, the third-party ROCKIT mark is currently being used in connection with a standing barbell squat machine. A portion of the Rockit webpage is shown below. Rockit webpages are of record (Exhibit C, RFR.)

Rockit « Soloflex Page 1 of 2

[Customer Service](#) [Contact Us](#) • 800-547-8802

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[Soloflex Muscle Machines](#)

[Sweatshirts](#)

Rockit

[Straps](#)

[Shock Rings](#)

[Plates](#)

[Parts and Accessories](#)

[Guides](#)


[The Soloflex Story: An American Parable](#)

[Download Product Brochures](#)

[Shipping Policies](#)

Home » Store

ROCKIT



The Most Perfect Exercise

What's the most powerful muscle building exercise? Standing Barbell Squats. What's the most effective muscle building exercise? Standing Barbell Squats. What's the most important muscle building exercise? Standing Barbell Squats.

Now, what's the most unstable, uncomfortable and downright dangerous muscle building exercise? Standing Barbell Squats. See the problem?

Here's the solution. The Rockit is designed to take you safely and comfortably through the exact plane of movement as, you guessed it, a standing barbell squat. The Rockit is a great way to keep you doing the world's best exercise. And reaping the priceless rewards for a job well done - strength, health and great looks.

Like the original Soloflex, the Rockit also uses weight straps rather than a stack machine. It is hard to believe that these straps really do the job but they do!

*Additional Shipping and Handling charges may apply on large or heavy items, particularly those shipping outside of the Continental U.S. If your order requires additional shipping and handling, Soloflex will contact you regarding payment of these charges. Your order will not be processed until all shipping and handling charges have been paid.

In addition, the name "Ab Balance Rock It" is used in connection with an exercise stepper. See webpages ([Exhibit D](#), RFR.)

Consumers are already faced in the marketplace with different exercise products sold by different parties having names that include "Rocket", "Rockit" or "Rock It". It is respectfully submitted that consumers will be able to readily distinguish between Applicant's Mark and cited marks. See, *Smithkline Beckman Corp. v. Proctor & Gamble Co.*, 223 U.S.P.Q. 1230 (N.D.N.Y. 1984), *aff'd without op.*, 755 F.2d 914 (2d Cir. 1985) (no confusion found where consumers are faced with other similar marks and will be able to distinguish

defendant's mark, which was no more confusing than existing marks).

III. CONCLUSION

It is respectfully submitted the facts in the record of the present application do not demonstrate that confusion is probable and, indeed, in view of the differences in sight and sound as well as different meanings and connotations, the mere possibility of confusion of the respective marks -- ROCKETLOK and ROCKET FITNESS -- is highly questionable.

Therefore, for all of the foregoing reasons, Applicant respectfully requests that the Board reverse the refusal to register Applicant's mark and allow the subject application to proceed to publication.

Dated: January 31, 2013

Respectfully submitted,



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**TSDR STATUS SHEET FOR
'711 REGISTRATION**

Generated on: This page was generated by TSDR on 2013-01-25 14:59:06 EST

Mark: ROCKETLOK



US Serial Number: 78415303

Application Filing Date: May 07, 2004

US Registration Number: 2994711

Registration Date: Sep. 13, 2005

Register: Principal

Mark Type: Trademark

Status: Registration cancelled because registrant did not file an acceptable declaration under Section 8. To view all documents in this file, click on the Trademark Document Retrieval link at the top of this page.

Status Date: Oct. 12, 2012

Publication Date: Jun. 21, 2005

Date Cancelled: Oct. 12, 2012

Mark Information

Mark Literal Elements: ROCKETLOK

Standard Character Claim: No

Mark Drawing Type: 3 - AN ILLUSTRATION DRAWING WHICH INCLUDES WORD(S)/ LETTER(S)/NUMBER(S)

Design Search Code(s): 18.09.02 - Capsules, space;Space capsules;Rockets, space;Space rockets;Missiles and rockets (space)
26.01.02 - Plain single line circles;Circles, plain single line
26.01.21 - Circles that are totally or partially shaded.

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *.* identify additional (new) wording in the goods/services.

For: manually operated exercise equipment, namely, a weight exercise apparatus having an interlocking grip bar and rotationally removable weight plates, featuring a weight plate attached to a socket on the grip bar which can be interlocked with additional weight plates using a simple inset and twist motion and designed to limit rattle-type noise typical of loose weights on a barbell and featuring a latching mechanism to prevent a weight plate from being accidentally disconnected

International Class: 028 - Primary Class **U.S Class:** 022, 023, 038, 050

Class Status: SECTION 8 - CANCELLED

Basis: 1(a)

First Use: Jun. 24, 2003 **Use in Commerce:** Sep. 15, 2003

Basis Information (Case Level)

Filed Use:	Yes	Currently Use:	Yes	Amended Use:	No
Filed ITU:	No	Currently ITU:	No	Amended ITU:	No
Filed 44D:	No	Currently 44D:	No	Amended 44D:	No
Filed 44E:	No	Currently 44E:	No	Amended 44E:	No
Filed 66A:	No	Currently 66A:	No		
Filed No Basis:	No	Currently No Basis:	No		

Current Owner(s) Information

Owner Name:	ROCKETLOK, L.L.C.		
Owner Address:	4946 TOP LINE DR. DALLAS, TEXAS 75247 UNITED STATES		
Legal Entity Type:	LIMITED LIABILITY COMPANY	State or Country Where Organized:	TEXAS

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Robert Trent Pipes

Docket Number: 6852.003

Correspondent

**Correspondent
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tpipes@dunlapcoddling.com

**Correspondent e-
mail Authorized:** Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Oct. 12, 2012	CANCELLED SEC. 8 (6-YR)	
Oct. 28, 2009	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP	
Oct. 21, 2009	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP	
Oct. 15, 2009	ATTORNEY REVOKED AND/OR APPOINTED	
Oct. 15, 2009	TEAS REVOKE/APPOINT ATTORNEY RECEIVED	
Aug. 14, 2009	ATTORNEY REVOKED AND/OR APPOINTED	
Aug. 14, 2009	TEAS REVOKE/APPOINT ATTORNEY RECEIVED	
Dec. 11, 2007	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Aug. 30, 2006	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Dec. 14, 2005	UNDELIVERABLE MAIL - NO ACTION TAKEN	99888
Dec. 02, 2005	PAPER RECEIVED	
Sep. 13, 2005	REGISTERED-PRINCIPAL REGISTER	
Sep. 06, 2005	UNDELIVERABLE MAIL - COURTESY COPY MAILED	48371
Jun. 05, 2005	PAPER RECEIVED	

Jun. 21, 2005	PUBLISHED FOR OPPOSITION	
Jun. 14, 2005	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Jun. 01, 2005	NOTICE OF PUBLICATION	
Mar. 10, 2005	LAW OFFICE PUBLICATION REVIEW COMPLETED	76568
Feb. 28, 2005	APPROVED FOR PUB - PRINCIPAL REGISTER	
Feb. 15, 2005	AMENDMENT FROM APPLICANT ENTERED	76568
Jan. 25, 2005	CORRESPONDENCE RECEIVED IN LAW OFFICE	76568
Feb. 15, 2005	ASSIGNED TO LIE	76568
Jan. 25, 2005	PAPER RECEIVED	
Dec. 13, 2004	NON-FINAL ACTION E-MAILED	6325
Dec. 13, 2004	NON-FINAL ACTION WRITTEN	59899
Dec. 07, 2004	ASSIGNED TO EXAMINER	59899
May 14, 2004	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information - None

File Location

Current Location:	PUBLICATION AND ISSUE SECTION	Date in Location: Sep. 13, 2005
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Assignment Abstract of Title Information

Summary

Total Assignments: 1	Registrant: HT&R SPORTS, LLC
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Assignment 1 of 1

Conveyance: ASSIGNS THE ENTIRE INTEREST

Reel/Frame: 4078/0952	Pages: 4
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Date Recorded: Oct. 15, 2009

Supporting Documents: [assignment-tm-4078-0952.pdf](#)

Assignor

Name: H T & R SPORTS, L.L.C.	Execution Date: Oct. 07, 2009
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Legal Entity Type: LIMITED LIABILITY COMPANY **State or Country Where Organized:** NORTH CAROLINA

Assignee

Name: [ROCKETLOK, L.L.C.](#)

Legal Entity Type: LIMITED LIABILITY COMPANY **State or Country Where Organized:** TEXAS

Address: 4946 TOP LINE DR.
DALLAS, TEXAS 75247

Correspondent

Correspondent Name: DUNLAP CODDING, P.C.

Correspondent Address: P.O. BOX 16370
OKLAHOMA CITY, OK 73113

Domestic Representative - Not Found

NON-PRECEDENTIAL DECISIONS



In re Crosstex International, Inc.

Serial No. 77888336

Trademark Trial and Appeal Board

2011 TTAB LEXIS 183

June 1, 2011, Decided

CORE TERMS: registration, masks, registrant's, third-party, impression, laudatory, channels, suggestive, surgical, soft, registered, similarity, dental, veterinary, purchasers, engender, gentle, dictionary, trademark, dissimilarity, comfortable, consisting, register, listing, weak, sufficient basis, likely to cause, connotation, ultralight, ultraclean

DISPOSITION:

[*1]

Decision: The refusal to register is reversed.

COUNSEL:

Laura E. Smith, Esq. for Crosstex International, Inc.

Kapil K. Bhanot, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

JUDGES: Before Seeherman, Grendel and Bergsman, Administrative Trademark Judges.

OPINION BY: BERGSMAN

OPINION:

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Opinion by Bergsman, Administrative Trademark Judge:

Crosstex International, Inc. ("applicant") filed a use-based application to register the mark ULTRA, in standard character form, for "surgical face masks," in Class 10.

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark is likely to cause confusion with the mark ULTRA SOFT and design, shown below, for "face masks for medical, dental and veterinary use," in Class 10. n1

n1 Registration No. 3257637, issued July 3, 2007.

[*2] .



We first turn to an evidentiary matter. In the appeal brief, the examining attorney objected to applicant's submission of a table of registrations and applications of marks consisting, in whole or in part, of the word "Ultra" for goods in Class 10, attached as an exhibit to applicant's April 22, 2010 response. Applicant's table included the mark, goods, status, and "owner of record." Applicant referred to the marks listed in the table to rebut the examining attorney's contention that the word "Ultra" is the dominant element of the mark in the cited registration and to show that "Ultra" is a weak term when used in connection with goods in Class 10. In the May 10, 2010 Office action, the examining attorney noted applicant's table "as evidence of the weakness of the term ULTRA," but stated that the marks in the table were not persuasive because the goods in the application and the cited registration are identical. The examining attorney did not object to the table of registrations in the May 10, 2010 Office Action; the examining attorney did not raise the objection until the examining attorney's appeal brief.

To make registrations of [*3] record, soft copies of the registrations or the complete electronic equivalent (*i.e.*, complete printouts taken from any of the USPTO's automated systems (TESS, TARR, or TRAM)) must be submitted. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998); *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1561 n.6 (TTAB 1996); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1231-32 (TTAB 1992).

"If an applicant includes a listing of registrations in a response to an Office action, and the examining attorney does not advise the applicant that the listing is insufficient to make the registrations of record at a point when the applicant can correct the error, the examining attorney will be deemed to have stipulated the registrations into the record." TBMP § 1208.02 (3rd ed. 2011). *See also In re 1st USA Realty Professionals*, 84 USPQ2d 1581, 1583 (TTAB 2007) (Board considered applicant's own registration, provided for the first time on appeal, because it had been referred [*4] to during prosecution and the examining attorney addressed the issue without objection; Board also allowed evidence of a list of third-party registrations because the examining attorney did not advise applicant of the insufficiency of the list while there was still time to correct the mistake); *In re Broyhill Furniture Industries, Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001) (objection to evidence waived where it was not interposed in response to applicant's reliance on listing of third-party registrations in response to initial Office action). Because the examining attorney addressed the merits of the evidence in applicant's table of registrations without objection in the May 10, 2010 Office action, we find that the examining attorney waived his/her right to object.

With respect to the pending applications listed in the table, a pending application is incompetent to prove anything other than the fact that it was filed. *Merritt Foods Co. v. Americana Submarine*, 209 USPQ 591, 594 (TTAB 1980). Accordingly, we give no consideration to the applications listed in applicant's table.

Our determination of likelihood of confusion under Section 2(d) is based [*5] on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de*

Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity and nature of the goods described in the application and registration, the likely-to-continue channels of trade and classes of consumers.

Applicant is seeking to register its mark for "surgical face masks" and registrant's mark is registered for "face masks for medical, dental and veterinary use." The goods at issue are legally identical for purposes of our likelihood [*6] of confusion analysis. Because the goods described in the application and the cited registration are legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers").

Applicant contends that "registrant's general purpose face masks, suitable for veterinary as well as dental and medical use are not interchangeable with the applicant's surgical face masks and that, therefore, they do not serve the same purpose nor move in the same channels of trade." The problem with applicant's argument is that in considering the scope of the cited registration, we look [*7] to the registration itself, and not to extrinsic evidence about the registrant's actual goods, customers, or channels of trade. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 46 C.C.P.A. 711, 1958 Dec. Comm'r Pat. 432, 119 USPQ 139 (CCPA 1958). *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). The description of goods in the registration are not restricted in any way and, therefore, we find that registrant's face masks for medical use encompass applicant's surgical face masks.

B. The strength of the cited registration.

A major part of our consideration of whether the marks are similar is the strength of the mark in the cited registration. With respect to the inherent strength of the registered mark, the word "Ultra" means "going beyond what is usual or ordinary; excessive; extreme." n2 The word "Soft" means, *inter alia*, "smooth and agreeable to the touch; not rough or coarse: a soft fabric; soft skin. ... gentle or mild" n3 Thus, the [*8] term "Ultra Soft" means very smooth and agreeable to the touch, very comfortable or very gentle. This finding is supported by definitions of terms using the word "Ultra." For example, "ultraclean" means "extremely clean," "ultralight" means "extremely light," and "ultrapure" means "extremely pure." n4

n2 The Random House Dictionary of the English Language (Unabridged), p. 2050 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

n3 *Id.* at 1813.

n4 *Id.* at 2050.

As indicated above, applicant submitted a table of 71 registrations of marks consisting, in whole or in part, of the

word "Ultra" for goods in Class 10, including Registration No. 3667615 for the mark ULTRAMASK for respiratory face masks for medical purposes. Thus, on the record before us, there are three "Ultra" marks [*9] (*i.e.*, ULTRA, ULTRA SOFT and design and ULTRAMASK) and two "Ultra" registrations for "Ultra" marks (the cited registration and Registration No. 3667615) for medical face masks.

We also note from the materials submitted by applicant the following sets of registrations for "Ultra" marks for related medical products, owned, except where noted, by different entities:

1. Gloves for medical and/or dental use.

Mark	Registration No.	Goods
ULTRAGARD	3256375	Disposable latex, vinyl, and nitrile gloves for medical use
ULTRASENSE	3283673	Disposable gloves for medical and dental use
ULTRAFORM<5>	2725421	
ULTRA-SOFT	3489426	Gloves for medical use
ULTRA-FIT	1868143	Glove liners for use with latex gloves for use by persons with latex sensitivity
ULTRA-PLUS<6>	2052671	Latex examination gloves used in the dental-medical fields

<5> These registrations are both owned by Microflex Corporation.

<6> This registration is owned by applicant.

2. Products and accessories for ultrasound procedures.

Mark	Registration No.	Goods
UL-TRASHAPE	3390298	Ultrasonic therapeutic medical apparatus for medical, aesthetic and therapeutic purposes
ULTRA-COVER	3607822	Disposable medical products, including, inter alia, ultrasonic transducer covers
ULTRAMAX	2792486	Ultrasonic skin cleaning device

ULTRAFIT	3728718	Disposable protective cover for ultrasound probes
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UL- TRAGLIDE	2272095	Medical diagnostic ultrasound scanning gel
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[*10]

3. Needles.

Mark	Registration No.	Goods
ULTRA-FINE	2642357	Medical syringes and needles

UL- TRACLEAN	2501133	Acupuncture needles
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ULTRA GLIDE	2293488	Suture needles
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ULTRASAFE	2624070	Needle guards and unit dose injection systems
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4. Surgical blades

Mark	Registration No.	Goods
ULTRAFIT	2900456	Surgical blades and scalpels
ULTRA POINT	2086741	Surgical blades and blade tips

ULTRACUT	2707889	Shaver blades for endoscopic use
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5. Sutures and related products

Mark	Registration No.	Goods
ULTRAB- RAID	3018683	Surgical suture
ULTRA GLIDE	2272095	Suture needles

ULTRAFIX 2162402 Suture anchors, suture anchor
inserters, and suture threaders

Third-party registrations are not evidence that the marks are in use, much less that the extent of such third-party use has been so great that consumers have become accustomed to seeing various ULTRA marks in connection with medical products, specifically face masks and, therefore, have learned to distinguish between them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing [*11] public is not aware of registrations reposing in the U.S. Patent and Trademark Office); *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Nevertheless, the third-party registrations may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods and services, or that it has significance in a particular trade or industry.

The word "Ultra" is common to all of the listed registrations. The dictionary definition shows that it has a laudatory meaning that suggests the presence of some extraordinary characteristic. An inference that we can draw from the numerous third-party registrations consisting of the word "Ultra" in connection with medical products is that because of the suggestive or laudatory nature of the word "Ultra," a number of different registrants have believed that various "Ultra" marks can be used and registered side-by-side without causing confusion provided there are minimal differences between the marks and/or the goods. *See Plus Products v. Natural Organic, Inc.*, 204 USPQ 773, 779 (TTAB 1979); *Jerrold Electronics Corp. v. The Magnavox Company*, 199 USPQ 751, 757-758 (TTAB 1978) [*12] (third-party registrations reflect belief by registrants, who would be most concerned about avoiding confusion, that various "Star" marks can coexist provided that there is some difference between them); *In re Sien Equipment Co.*, 189 USPQ 586, 589 (TTAB 1975) (the suggestive meaning of the word "Brute" explains the numerous third-party registrations incorporating that word with other wording or material no matter how little additional significance they may add to the word "Brute" *per se*). Therefore, unlike a situation involving an arbitrary or fanciful mark, the addition of other matter to a laudatory or suggestive word may be enough to distinguish it from another mark. *In re Hunke & Jocheim*, 185 U.S.P.Q. (BNA) 188, 189 (TTAB 1975).

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the [*13] possibility of confusion that exists in the latter case.

Sure-Fit Products Company v. Saltzson Drapery Company, 254 F.2d 158, 45 C.C.P.A. 856, 1958 Dec. Comm'r Pat. 236, 117 USPQ 295, 297 (CCPA 1958). Under these circumstances, marks comprising or containing the word "Ultra" in the medical field should be accorded a narrow scope of protection.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1988).

In comparing the marks, we note that the marks are similar in that they have in common the word "Ultra." However, as discussed above, the word "Ultra" has a laudatory or suggestive meaning, and in the [*14] circumstances of this case, the inclusion in both marks of this laudatory element is not a sufficient basis for finding likelihood of

confusion. Rather, the marks have different meanings and engender different commercial impressions. As indicated above, applicant's mark ULTRA means "going beyond what is usual or ordinary; excessive; extreme." When "Ultra" stands alone as a mark, it engenders the commercial impression of "the best." Registrant's mark ULTRA SOFT, on the other hand, means extremely comfortable or extremely gentle and therefore engenders a different commercial impression from applicant's mark. These differences in meaning and commercial impression between applicant's mark ULTRA and registrant's mark ULTRA SOFT and design, given the weakness of the word "Ultra," are sufficient to distinguish the marks.

The examining attorney contends that "[a]pplicant's mark ULTRA is similar to the Registered Mark, ULTRASOFT, because both contain the dominant feature ULTRA." n7 We disagree with the premise that the word "Ultra" is the dominant element of the registered mark. Registrant's mark is a unitary term. The word "Ultra" modifies the word "Soft" to convey the meaning that registrant's [*15] face masks are very gentle or comfortable. The dictionary definitions using the word "Ultra" noted above (*e.g.*, ultraclean, ultralight, and ultrapure) corroborate this finding.

n7 Examining Attorney's Appeal Brief, unnumbered page 3.

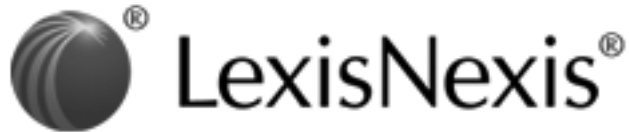
D. Balancing the *du Pont* factors.

Despite the fact the goods at issue are identical, because the word "Ultra" is a laudatory term, the fact that it is common to both applicant's and registrant's mark is not a sufficient basis to find confusion, particularly because the marks ULTRA and ULTRA SOFT and design have different meanings and engender different commercial impressions. Accordingly, we find that applicant's mark ULTRA for "surgical face masks" is not likely to cause confusion with the mark ULTRA SOFT and design for "face masks for medical, dental and veterinary use." In saying this, however, we wish to make clear we consider "Ultra" to be a suggestive or laudatory term for medical goods that is entitled to only a narrow scope of protection or exclusivity [*16] of use, such that if a registration issues to applicant it will also be entitled to a limited scope of protection.

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark LawLikelihood of ConfusionSimilarityAppearance, Meaning & SoundGeneral OverviewTrademark LawProtection of RightsGeneral OverviewTrademark LawSubject MatterDescriptive & Laudatory TermsLaudatory Terms Defined



In re MTTM Worldwide, LLC

Serial Nos. 77602546; 77603454; and 77622669

Trademark Trial and Appeal Board

2010 TTAB LEXIS 123

April 26, 2010, Decided

CORE TERMS: clothing, registrant, bags, consumers, jackets, shirts, pants, registration, third-party, similarity, purchaser, channel, presume, disclaimed, handbags, impression, purses, entity, girl, registered, entireties, weigh, identification, sweatshirts, register, encountering, originated, consisting, appearance, underwear

DISPOSITION:

[*1]

Decision: The refusals to register are affirmed.

COUNSEL:

Peter J. Vranum of Gordon, Herlands, Randolph & Cox for MTTM Worldwide, LLC.

Russ Herman, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

JUDGES: Before Quinn, Hairston and Grendel, Administrative Trademark Judges.

OPINION BY: QUINN

OPINION:

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Opinion by Quinn, Administrative Trademark Judge:

MTTM Worldwide, LLC filed intent-to-use applications to register the mark MOB NYC ("NYC" disclaimed) (in standard characters) for "jackets, pants [and] shirts" (in International Class 25); n1 and "all purpose carrying bags, back packs, duffel bags, gym bags, handbags, key cases, purses, sling bags, sport bags, tote bags, umbrellas [and] wallets" (in International Class 18). n2 MTTM Worldwide, LLC also filed an intent-to-use application to register the mark MOB GIRL ("GIRL" disclaimed) (in standard characters) for "jackets, pants [and] shirts" (in International Class 25). n3 In each application, applicant claimed ownership of Registration No. 3287374, issued September 4, 2007, of the mark MARRIED TO THE MOB for "clothing for women, namely tee-shirts, sweatshirts, [*2] tank-tops and bathing suits"

(in International Class 25).

n1 Application Serial No. 77602546, filed October 28, 2008.

n2 Application Serial No. 77622669, filed November 26, 2008.

n3 Application Serial No. 77603454, filed October 29, 2008.

The trademark examining attorney refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's marks, when applied to applicant's goods, so resembles the previously registered mark MOB INC. ("INC." disclaimed) (in typed form) for "men's and women's clothing, namely consisting of--shirts, pants, jackets, baseball hats, beanies, tank tops, jerseys, socks, sweaters, sweatshirts, [and] underwear" (in International Class 25), n4 as to be likely to cause confusion.

n4 Registration No. 2775484, issued October 21, 2003; Section 8 affidavit filed and accepted.

[*3]

When the refusals were made final, applicant appealed. Applicant and the examining attorney filed briefs.

The appeals involve common issues of law and fact, and the records are very similar. n5 Accordingly, the Board will decide the appeals in this single opinion.

n5 In each of the appeals, the examining attorney submitted additional evidence with his appeal brief. The evidence comprises copies of third-party registrations to show the less than distinctive nature of the terms "NYC" and "GIRL" as they appear in marks for clothing and handbags. In its reply brief, applicant neither objected to or discussed the new evidence. Nevertheless, the submission of the additional evidence with the appeal brief is manifestly untimely. Trademark Rule 2.142(d). Accordingly, this evidence has not been considered.

Before turning to the specifics of each appeal, we will set forth general legal principles relating to the issue of likelihood of confusion that apply equally to all three appeals.

Our determination of the issue [*4] of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

As to the marks, we must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion [*5] as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the

recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

With respect to the second *du Pont* factor regarding the similarity between the goods, it is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. The issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). In considering this *du Pont* factor, we [*6] acknowledge that there is no per se rule governing likelihood of confusion in cases involving clothing items. *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984).

We now turn to address each of the appeals.

Application Serial Nos. 77602546 and 77622669:

MOB NYC

We first turn to a comparison of the goods. As indicated earlier, applicant is seeking to register its mark MOB INC. for "jackets, pants [and] shirts" (in International Class 25), and "all purpose carrying bags, back packs, duffel bags, gym bags, handbags, key cases, purses, sling bags, sport bags, tote bags, umbrellas [and] wallets" (in International Class 18). Registrant's identification of goods reads "men's and women's clothing, namely consisting of--shirts, pants, jackets, baseball hats, beanies, tank tops, jerseys, socks, sweaters, sweatshirts, [and] underwear" (in International Class 25).

Insofar as the clothing items in Class 25 are concerned, they are identical in part (shirts, pants and jackets), or otherwise are closely related. Applicant does not dispute this point.

Applicant does dispute, however, that its Class 18 goods are related to registrant's clothing items. Applicant [*7] argues that "[l]uggage and bags are sold in different stores than apparel items, except perhaps in the case of a department store, where the clothing items and luggage would be in different departments, most likely on different floors." (Brief, p. 4).

In connection with this *du Pont* factor, the examining attorney introduced several third-party use-based registrations showing that the same entities have registered a single mark for both carrying bags (e.g., handbags, purses, tote bags), as well as for clothing. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Moreover, as shown by its two applications, applicant itself intends to use the same mark for both its clothing and bags.

We find that applicant's variety of bags, particularly handbags and purses, are related to registrant's [*8] jackets, pants and shirts for women. Women's handbags and purses may be chosen to complement clothing; such items might be bought during the same shopping trip "to fashion a complete ensemble." *Justin Industries, Inc. v. D.B. Rosenblatt, Inc.*, 213 USPQ 968, 976 (TTAB 1981).

Insofar as the trade channels and classes of purchasers are concerned, we note that there are no trade channel limitations in either applicant's or registrant's identification of goods. Accordingly, we must presume that the goods, as identified, are marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, given the identity or otherwise close relationship between the goods, we presume that the goods move in the same or similar trade channels (e.g., clothing stores, boutiques, department stores, and the like). Further, given the absence of any limitation as to purchasers, we presume that the

goods are bought by the same classes of consumers, including ordinary ones. Inasmuch as the identifications do not include any limitations as to cost, we must also presume that the goods include [*9] relatively inexpensive items that would be subject to impulse purchase made by ordinary consumers with nothing more than ordinary care.

The above *du Pont* factors relating to the similarities of the goods, trade channels, purchasers and conditions of sale all weigh in favor of finding a likelihood of confusion.

With respect to a comparison of applicant's mark MOB NYC and registrant's mark MOB INC., it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.").

In applicant's mark, applicant disclaimed "NYC," while registrant has disclaimed "INC." apart from its mark. The term "NYC" (standing for "New York City") is either geographically descriptive or geographically [*10] deceptively misdescriptive; and the term "INC." is an entity designation having no source-indicating function. Although we have compared the marks in their entireties, these non-distinctive disclaimed terms play subordinate roles in each of the marks. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). Clearly, each of the marks is dominated by the identical arbitrary term "MOB" that is the first portion of each of the marks, and is the portion that is most likely to be remembered and used by consumers in calling for and referring to applicant's and registrant's goods. Given the commonality of the identical, arbitrary term "MOB" in each of the marks, we find MOB NYC and MOB INC. to be similar in sound and appearance.

Applicant's attempt to distinguish the marks in terms of meaning is not persuasive. Applicant argues that the cited mark "brings to mind a crime syndicate or a pseudo corporate grouping of gangsters" and "also clearly brings to mind the famous underworld crime group, 'Murder, Inc.,' which existed in the U.S. in the 1930s and 1940s." (Brief, p. 2). Applicant submitted information retrieved from online publications [*11] regarding the "renown" of Murder, Inc. and its prominent members Bugsy Siegel and Meyer Lansky. On the other hand, applicant contends that its mark is an acronym for "MOST OFFICIAL BITCHES NEW YORK CITY" and "brings to mind the New York Mafia or perhaps the crowded 'mob scene' that tourist[s] see in New York." (Brief, p. 3). In this connection, applicant submitted excerpts from its page on "myspace."

We agree with the examining attorney that the attempt to connect the meanings of MOB INC. and "Murder, Inc." is quite a stretch, being merely conclusory with no probative support. There simply is no basis upon which to conclude that consumers encountering registrant's mark will even think of Murder, Inc., let alone somehow give MOB INC. the specific connotation of some long-ago dissolved group called "Murder, Inc." Rather, we think it is likely that consumers will attribute the commonly understood and recognized meaning to the term "mob" in each mark, that is, a group or gang involved in the criminal underworld of a city. Random House Dictionary (2010). *See In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002) (judicial notice may be taken of dictionary [*12] definitions).

Further, because each of the marks comprises the common element "MOB" appearing first in both marks, followed by non-distinctive matter, the marks engender overall commercial impressions that are similar.

In view of the above, we find that the marks MOB NYC and MOB INC., when compared in their entireties, are similar. In making this finding, we also note that, at least with respect to a comparison of the marks for identical clothing items in Class 25, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In sum, the first *du Pont* factor, the similarity between the marks, weighs in favor of a finding of a likelihood of confusion.

In an attempt to limit the scope of protection given to the cited registration, applicant submitted third-party registrations of various marks that include the term "MOB" for clothing. Generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood [*13] of confusion, or to cause mistake, or to deceive. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973). Nevertheless, third-party registrations may be relevant to show that the mark or a portion of the mark has been so commonly adopted that the public will look to other elements of a mark to distinguish the source of the goods or services. See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269-70 (CCPA 1973); and *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983).

The problem with applicant's argument is that there is no distinctive element in either applicant's or registrant's mark other than "MOB" that consumers would look to in order to distinguish these marks. Further, each of the third-party registered marks includes additional matter which serves to distinguish those marks from others.

In any event, third-party registrations are not evidence of use of the marks shown therein. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ at 269. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed [*14] to the existence of similar marks in the marketplace, and as a result are able to distinguish among MOB marks for clothing and related goods based on any differences in the marks. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 177 USPQ at 463. Cf. *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565-66 (TTAB 1996) ("Evidence of widespread third-party use, in a particular field [restaurants], of marks containing a certain shared term [BROADWAY] is competent to suggest that purchasers have been conditioned to look to the other elements of the marks as a means of distinguishing the source of goods or services in the field.").

We conclude that consumers familiar with registrant's jackets, pants and shirts sold under the mark MOB INC. would be likely to mistakenly believe, upon encountering applicant's mark MOB NYC for jackets, pants and shirts, as well as handbags, purses, and similar types of bags, that these identical goods or otherwise related goods originated with or are somehow associated with or sponsored by the same entity. Consumers would be likely to perceive applicant's mark MOB NYC as identifying a brand extension of registrant's MOB INC. product line [*15] originating in New York City, or with a New York City style or look.

Application Serial No. 77603454:

MOB GIRL

Applicant is seeking to register its mark MOB GIRL for "jackets, pants [and] shirts," and the cited registration of the mark MOB INC. lists registrant's goods as "men's and women's clothing, namely consisting of--shirts, pants, jackets, baseball hats, beanies, tank tops, jerseys, socks, sweaters, sweatshirts, [and] underwear."

The goods are identical as to jackets, pants and shirts. In view of this identity, we presume, as we did above in considering applicant's other applications, that the goods move in the same trade channels (e.g., clothing stores, boutiques, department stores, and the like). Further, given the absence of any limitation as to purchasers, we presume that the goods are bought by the same classes of consumers, including ordinary ones. Given that the identifications do not include any limitations as to cost, we must also presume that the clothing includes relatively inexpensive items that would be subject to impulse purchase made by ordinary consumers with nothing more than ordinary care.

The identity in the goods, trade channels, purchasers [*16] and conditions of sale weigh heavily in favor of a finding of likelihood of confusion.

In considering the marks, we again note that when marks are used in connection with identical goods, as is the case herein, at least in part, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 23 USPQ2d at 1700.

Applicant's mark MOB GIRL is similar to registrant's MOB INC. Both marks clearly are dominated by the identical arbitrary term "MOB" that is the first portion of each mark. The generic/highly descriptive word "GIRL" is disclaimed and does little in the mark other than to inform consumers that the clothing is for girls. The abbreviation "INC." in registrant's mark is an entity designation having no source-indicating capability.

The marks are similar in sound and appearance. As to meaning, applicant contends that its mark is an "acronym" for "MOST OFFICIAL BITCHES GIRL," and for those not familiar with applicant's clothing, "brings to mind a young female who consorts with members of a criminal group, perhaps a mobster's girlfriend." (Brief, p. 3). Although [*17] the marks may have specific differences in meaning, both convey a connection with an underworld group. Given that the marks are for identical clothing items, we find that MOB INC. and MOB GIRL engender similar overall commercial impressions.

The similarities between the marks weigh in favor of a finding of a likelihood of confusion.

As it did in the other applications discussed above, applicant introduced third-party registrations of marks that include "MOB" as a portion thereof. For the reasons expressed earlier, this evidence does not persuade us to reverse the refusal.

We conclude that consumers familiar with registrant's jackets, pants and shirts sold under the mark MOB INC. would be likely to mistakenly believe, upon encountering applicant's mark MOB GIRL for jackets, pants and shirts, that these identical goods originated with or are somehow associated with or sponsored by the same entity. Consumers would be likely to perceive applicant's mark MOB GIRL as identifying an extension of registrant's MOB INC. clothing line that is designed for girls.

Conclusion

In each of the appeals, we conclude that the record establishes that confusion between applicant's and registrant's [*18] marks for their respective goods is likely to occur in the marketplace.

To the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Legal Topics:

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